whether he is guilty of the offence charged or claims to be tried.

Section 163 of the Criminal Procedure Code, which is equivalent to section 233 of the Indian Criminal Procedure Code, is as follows :—

> For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170.

The object of section 233 of the Indian Code is explained by Jackson J. in the case of *Mahomed Humayoon Shah v. Regina*[2] :—

> The charge I take to be, first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself; second, it is an information to the Court which is to try the accused, of the matters to which evidence is to be directed.

In the present case the prosecution, through the medium of one charge, left the appellant in doubt at his trial as to whether they were alleging that he had unlawfully remained on the Estate with the intention of committing an offence or whether he had unlawfully remained there with the intention of annoying the Assistant Manager. Accordingly the appellant must have been embarrassed at the trial.

The prosecution has only itself to blame for this, because section 166 of the Criminal Procedure Code provides for an accused person being charged in the alternative, and the prosecution could have framed alternative charges against the appellant, the first charge alleging that he remained unlawfully on the Estate with intent to commit an offence, and the alternative charge alleging that he did so with intent to annoy the Assistant Manager. There would then have been a definite finding whether the appellant was guilty on the first charge or on the alternative charge.

Since express provisions of the Criminal Procedure Code have been contravened, I hold, following the decision of the Federated Malay States Court of Appeal in the case of *Yap Liow Swee v. P. P.*[3] that this contravention "is a matter of substance and not of form; it creates uncertainty and embarrassment; it is a charge to which it is impossible to make a simple plea; it is an illegality".

Accordingly I allow this appeal and quash the conviction and sentence. I order the appellant to be re-tried before another Magistrate.

Retrial Ordered.

NG PENG CHOON v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J. Malayan Union, Murray Aynsley, C.J. Singapore and Brown, J.) April 3, 1947]

Criminal Procedure Code (F.M.S.), Section 198—Trial with Assessors—Trial Judge must agree with opinion of both assessors or of one assessor before he can give judgment—Johore Courts Enactment, Section 75.

In this case the appellant was convicted of murder and sentenced to death. After the summing up of the learned trial Judge, both the assessors gave their opinions that the accused was guilty of murder. The learned trial Judge stated that he did not disagree with those opinions. On the record of the trial there was the following note by the trial Judge. "Both Assessors return a verdict of guilty of murder, a verdict with which I do not disagree."

Held, that by virtue of Section 198 (i) of the Criminal Procedure Code there must be positive agreement between the Judge and the opinion of both assessors or of one assessor, as the case may be, and the record of the trial must show this.

CRIMINAL APPEAL.

A. N. Mitra for the appellant.

McCall for the Public Prosecutor.

The judgment of the Court of Appeal was given by :

Willan, C. J. :—In this case the appellant was convicted in the State of Johore of murder and sentenced to death.

After the summing-up of the learned trial Judge, both the Assessors gave their opinions that the appellant was guilty of murder. The learned trial Judge stated that he did not disagree with those opinions. On the record of the trial there is the following note by the learned trial Judge :—

> Both Assessors return a verdict of guilty of murder, a verdict with which I do not disagree.

By section 75 of the Johore Courts Enactment (Cap. 54) and the Schedule thereto, the Criminal Procedure Code of the Federated Malay States is law in that State. Section 198 of that Code is as follows :—

> 198 (i) If the Court agrees with the opinion of both Assessors, or where the Assessors are of different opinions with the opinion of one Assessor the Court shall give judgment accordingly.
>
> (ii) If the Court is unable to agree with the opinion of both Assessors, or of the one remaining Assessor as provided by section 188, the proceedings shall be stayed and a new trial held with the aid of fresh Assessors.

It is clear from the wording of sub-section (i) of that section that there must be positive agreement between the Judge and the opinion of both Assessors or of one Assessor, as the case may be, and the record of the trial must show this. In this case the record does not disclose any such positive agreement; it merely discloses

that the Judge did not disagree with the opinions of both the Assessors.

The Court of Appeal cannot imply that when a trial Judge states he does not disagree with the opinions of the Assessors that such statement is equivalent to a positive assertion that he did agree with such opinion.

Accordingly we have no option but to allow this appeal and direct that there shall be a new trial with the aid of fresh Assessors as provided by sub-section (ii) of section 198 of the Criminal Procedure Code.

Retrial Ordered.

JUBRI BIN HAJI SALLEH v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J. Malayan Union, Murray Aynsley, C.J. Singapore and Brown, J.) April 3, 1947]

Evidence Enactement, Sections 25 and 27—Criminal Procedure (F.M.S.), Sections 11, 13, 14, 15, 23 and 25—A Penghulu is not ordinarily a police officer within the meaning of Section 25 of the Evidence Enactment.

In this case the appellant was convicted of murder and sentenced to death. The case for the prosecution rested entirely on a confession made by the appellant to the Penghulu of the mukim in which he resided. At the trial it was submitted that the Penghulu was a Police officer and therefore that the confession was inadmissible in evidence on account of Section 25 of the Evidence Enactment. The learned trial Judge ruled against this submission and admitted the confession in evidence.

Held, (1) that where a penghulu possesses no more powers than are conferred upon him by the Criminal Procedure Code, as in this case, he cannot be regarded as a Police officer, and Section 25 of the Evidence Enactment does not apply.

(2) that although the penghulu was a person in authority, there was no evidence to show that any inducement, threat or promise was made and therefore the confession was rightly admitted in evidence.

Cases referred to :—

(1) *Rasiah v. Public Prosecutor* (1931-2) F.M.S.L.R. 45.

(2) *Nanoo v. Emperor* I.L.R. 51 Bombay 78.

CRIMINAL APPEAL.

J. L. R. Pillai for Appellant.

McCall for the Public Prosecutor.

The judgment of the Court of Appeal was delivered by :

Willan, C. J. :—In this case the appellant was convicted in the State of Johore of murder and sentenced to death.

The appellant, a Javanese, lived in a kampong near Batu Pahat on his own small holding of land cultivated with rubber. The case for the prosecution rested entirely on a confession made by the appellant to the Penghulu of the mukim in which the appellant resided.

At the trial this Penghulu produced his letter of appointment as a penghulu, which was in the Malay language. An examination of it revealed that it contains a Malay version of sections 11, 13, 14, 15, 23 and 25 of the Federated Malay States Criminal Procedure Code, which, by section 75 of the Johore Courts Enactment (Cap. 54) and the Schedule thereto, is law in the State of Johore. As far as penghulus are concerned the provisions of those sections are as follows :—

Section 11: Any member of the public is bound to assist a penghulu if such penghulu demands his aid in the taking, or preventing the escape, of any person whom such penghulu is authorised to arrest.

Section 13: Any member of the public is bound to give information to the nearest penghulu if such member is aware of :—

(a) The commission of certain specified offences, or

(b) The intention of any person to commit any of those specified offences, or

(c) Any sudden or unnatural death or death by violence or any death under suspicious circumstances or the body of any person being found without its being known how such person came by death.

Section 14: Every penghulu shall communicate to the nearest Magistrate or police officer not below the rank of Inspector any information which such penghulu has or obtains respecting :—

(a) The occurrence of any sudden or unnatural death under suspicious circumstances, or

(b) The finding of the dead body of any person without its being known how such person came by his death.

Section 15: The way in which an arrest shall be effected.

Section 23: When a penghulu may arrest without a warrant.

Section 25: A penghulu making an arrest without a warrant shall make over the person so arrested to a police officer without delay.